STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 12, 2005
v	No. 254865 Bay Circuit Court
LEON WALTER KONESKO, Defendant-Appellant.	LC No. 03-010623-FC

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit armed robbery, MCL 750.89, first-degree home invasion, MCL 750.110a(2), larceny in a building, MCL 750.360, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 120 to 360 months for the first-degree home invasion conviction, 240 to 600 months for the assault with intent to commit armed robbery conviction, and 48 to 72 months for the larceny conviction. Defendant was also sentenced to a two-year term for each felony-firearm conviction to be served concurrently with each other and consecutively to the other sentences. We affirm.

Defendant first argues there was insufficient evidence adduced at trial to convict him of assault with intent to rob while armed and larceny in a building. We disagree.

A claim of insufficient evidence is reviewed de novo, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), in a light most favorable to the prosecutor to determine whether a rational trier of fact could have found the elements of the offense proven beyond a reasonable doubt, *People v Johnson*, 460 Mich 720, 723; 507 NW2d 73 (1999). "'The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed. Because this is a specific-intent crime, there must be evidence that the defendant intended to rob or steal.'" *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003), quoting *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). Circumstantial evidence and the reasonable inferences that arise from the evidence can satisfactorily prove the elements of a crime, *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), including the intent to rob or steal, *People v Harris*, 110 Mich App 636, 641; 313

NW2d 354 (1981). Because state of mind is hard to prove, minimal circumstantial evidence is required. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

After considering the record evidence in the appropriate light, we conclude that it was more than sufficient to establish the elements of assault with intent to rob while armed. Defendant admits he was armed with a gun, and he assaulted the victim by hitting him in the head with it. The testimony was also sufficient to establish that defendant intended to rob or steal from the victim. Defendant pointed a gun at the victim's head while his companion demanded that the victim turn over money, jewelry, or drugs. Defendant continued to hold a gun to the victim's head while the victim searched through drawers looking for something of value. A reasonable juror could infer from these facts and circumstances that defendant had the requisite intent to rob or steal. *Harris*, *supra* at 641. Defendant argues that because he was not interested in robbing the victim, and his companion was merely taking back property which rightfully belonged to him, defendant lacked the requisite intent. Defendant's version merely presents a question of credibility that the jury appears to have resolved in favor of the prosecution, and which we will not revisit on appeal. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

The elements of larceny in a building are a taking, either actual or constructive, of goods or property of another within a building, and asportation of the goods with felonious intent and against the owner's will. *People v Sykes*, 229 Mich App 254, 278; 582 NW2d 197 (1998). A conviction of aiding and abetting a crime requires proof that (1) the charged offense was committed by someone; (2) the defendant acted or encouraged in a manner that assisted in its commission; and (3) the defendant either intended that the offense be committed or knew that the principal intended to commit the offense when the defendant helped or encouraged it. *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004).

Again viewing the evidence in the proper light, we conclude that it was sufficient to establish that defendant aided and abetted in the larceny. First, there is sufficient evidence to find that defendant's companion committed a larceny in a building, i.e., the taking and asporation of the victim's cellular telephone without the victim's permission after the victim had fled the apartment. Second, a reasonable juror could infer from the circumstances that defendant encouraged and assisted in the commission of this offense. Given that the evidence tends to establish a concert of action by defendant and his companion before the victim fled, the jury could reasonably infer that they two continued to work together after the victim left.

Next, defendant argues that the trial court erred in failing to sua sponte instruct the jury on a claim of right defense. We disagree.

Because defendant failed to request this instruction below, we review for plain error affecting defendant's substantial rights. *Carines*, *supr*a at 763-764. "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). A defendant's good faith belief, even if mistaken or unreasonable, that the defendant had a legal claim of right to the property, negates the felonious intent required for larceny. *People v Cain*, 238 Mich App 95, 119; 605 NW2d 28 (1999). However, the claim of right must be bona fide and not merely a cover for a felonious taking. The taker's claim cannot

be simply a vague impression; it must be an honest conviction. *People v Karasek*, 63 Mich App 706, 713; 234 NW2d 761 (1975), quoting 52A CJS, Larceny, § 26, pp 449, 450.

Defendant's argument is premised on his companion's purported claim of right to money generated by the pawning of the companion's necklace. The money was apparently used to purchase drugs for use by both defendant's companion and the victim. While defendant's companion claimed at trial that the victim owed him money, he did not testify that there was an actual agreement for repayment. Further, there is no evidence that the alleged debt had a fixed value or that defendant's companion only demanded money in payment of a liquidated debt. Instead, the evidence shows that defendant's companion had demanded money, jewelry, drugs, or anything of value. While money is fungible, jewelry and drugs are not. 3 LaFave, Substantive Criminal Law (2d ed, 2003), §19.5(d), pp 93-94. Because the value of the alleged debt was not established, there is no way to assess the equivalency of the debt and the property obtained – a cellular telephone – under a claim of right. *Id*.

Additionally, the evidence did not support the assertion that defendant's companion honestly and reasonably believed that he was entitled to possession of the victim's personal property. The circumstances in which the alleged attempt to satisfy the debt occurred – late at night, during a home invasion, and at gun point – do not support a finding that defendant's companion had a legitimate claim of right to the property. Accordingly, the court did not commit plain error when it failed to sua sponte give an instruction regarding claim of right.

Next, defendant claims that the charges and jury instructions related to assault with intent to rob while armed and larceny in a building violate the constitutional ban on double jeopardy. We disagree. Defendant failed to preserve this issue by raising a double jeopardy objection either to the filed charges or the given jury instructions. *People v Matuszak*, 263 Mich App 42, 46-48; 687 NW2d 342 (2004). Therefore, we again review for plain error affecting substantial rights. *Id*.

Defendant's double jeopardy arguments are based on the theory that he should have been charged with armed robbery rather than assault with intent to rob while armed and larceny in a building. However, the prosecution could not have charged defendant with armed robbery because the cellular telephone was not taken from the victim's person or presence. MCL 750.529; *People v Ford*, 262 Mich App 443, 459; 687 NW2d 119 (2004).[1] "'There is no violation of double jeopardy protections if one crime is complete before the other takes place.'" *Id.*, quoting *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2000), quoting *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995). Accordingly, defendant's charges and subsequent convictions for assault with intent to rob while armed and larceny in a building do not violate the constitutional ban on double jeopardy.

[1] Defendant's reliance on *People v Randolf*, 466 Mich 532; 648 NW2d 164 (2002) is misplaced. In *Randolf*, our Supreme Court rejected the transactional approach to robbery and held that the force used during an escape from a larceny cannot elevate larceny to armed robbery. *Id*. at 551. *Randolf* did not hold that any force used prior to a larceny must be charged as part of an armed robbery.

Next, defendant argues defense counsel was ineffective for failing to request a claim of right instruction, as well as for failing to object to the alleged overcharging and instructional errors. In light of our conclusion that a claim of right defense was unwarranted under the circumstances of this case, defense counsel's failure to request such an instruction does not support a claim of ineffective assistance. See *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Counsel cannot be faulted for failing to make a meritless request for an instruction not warranted under the circumstances. See *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Similarly, because there is no merit to defendant's double jeopardy argument, defense counsel's failure to object to the charges or the jury instructions on this ground was not error. *Id*.

Next, defendant argues the trial court improperly assessed fifty points under offense variable (OV) 7, it was plain error for the court to score ten points for OV 13, and *Blakely v Washington*, 542 US ___ , 124 S Ct 2531; 159 L Ed 2d 403 (2004), mandates reversal because scoring points for OV 7 and OV 13 violated defendant's right to a jury trial. We disagree.

With respect to defendant's challenge to the scoring of OV 7, we review a trial court's factual findings at sentencing for clear error. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), citing *People v Leversee*, 243 Mich App 337, 349; 662 NW2d 325 (2000). OV 7 requires the court to assess fifty points if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). The evidence in this instance clearly supported a score of fifty points for OV 7. In particular, defendant's actions suggesting he was prepared to execute the victim could only have been intended to substantially increase the fear and anxiety that the victim suffered during the offense. Accordingly, the sentencing court properly exercised its discretion and the evidence properly supported the assessment.

Regarding OV 13, this Court reviews defendant's claim under a plain error standard because defendant failed to preserve this issue for appeal. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Because defendant's presentence investigation report reveals only one misdemeanor conviction in the five years preceding the charged offenses, the sentencing court relied on contemporaneous charges to find "a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property" under MCL 777.43(1)(c). MCL 777.43(2)(a). Defendant argues that the Legislature did not intend for the scoring of contemporaneous criminal activity under OV 13 because the sentencing guidelines already assess points for contemporaneous activity under OV 12[2] and prior record variable (PRV) 7.[3] We first look at the specific language used in a statute to determine the Legislature's intent. *People v Aguwa*, 245 Mich App 1, 3; 626 NW2d 176 (2001). Every word, phrase, and clause has meaning and the statute must not be construed in a manner that would render any part

[2] MCL 777.42.

[3] MCL 777.57.

surplusage or nugatory. *Id.* at 3-4. Clear and unambiguous language must be enforced as plainly written. *People v VanHeck*, 252 Mich App 207, 211; 651 NW2d 174 (2002).

OV 13 requires the court to assess ten points if "[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property." MCL 777.43(1)(c). OV 13 also provides that "[f]or determining the appropriate points under this variable, *all* crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a) (emphasis added). The plain language indicates that the court must also include contemporaneous crimes. See *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001). OV 13 also provides that "[e]xcept for offenses related to membership in an organized criminal group, [a sentencing court should] not score conduct scored in offense variable . . . 12." MCL 777.43(2)(c). Notably, defendant was not assessed points under OV 12.[4]

Further, while OV 13 assesses points for a pattern of criminal activity, PRV 7 assesses points for subsequent and concurrent felony convictions regardless of whether the convictions demonstrate a pattern. Where the sentencing guidelines variables are directed at different purposes, a trial court's assessment of points under both variables is proper. *People v Jarvi*, 216 Mich App 161, 164; 548 NW2d 676 (1996). Accordingly, the Court did not commit plain error when it assessed 10 points under OV 13.

Finally, we reject defendant's argument that *Blakely* mandates reversal because the scoring of points for OV 7 and OV 13 violates defendant's right to trial by jury. The Michigan Supreme Court and this Court have concluded that *Blakely* does not apply to sentences imposed in Michigan. *People v Wilson*, 265 Mich App 386, 399 ; 695 NW2d 351 (2005), citing *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004) and *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv granted 472 Mich 881 (2005).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Donald S. Owens

[4] Points may only be scored under OV 12 for acts that have not and "will not result in a separate conviction." MCL 777.42(2)(a)(*ii*).